Appeal No. B192627

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NORMAN K. MORROW,

Plaintiff and Appellant

vs.

THE LOS ANGELES UNIFIED SCHOOL DISTRICT, ROY ROMER, and ROWENA LAGROSA,

Defendants and Respondents

Appeal from the Superior Court for Los Angeles County
Honorable Susan Bryant-Deason, Judge
(Case Number BC349335)

RESPONDENTS' BRIEF

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Court of Appeal
State of California
Second Appellate District

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Court of Appeal Case Number: B192627

Case Name: Norman K. Morrow v. Los Angeles Unified School District, Romer and Lagrosa

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SECOND APPELLATE DISTRICT

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Tustin, California 92780

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Executed on January 17, 2007, at Los Angeles, California.

Jaki Nelson

Jaki Nelson

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INTRODUCTION

On April 18, 2005, Thomas Jefferson High School ("Jefferson High") in south central Los Angeles exploded in violence. Jefferson High would witness further rioting and unrest in the days and weeks ahead. Norman K. Morrow ("Appellant" or "Morrow"), then in his fifth year as principal of Jefferson High, appeared powerless to stem the tide of violence.

During the unrest on Appellant's campus, Superintendent Roy Romer ("Romer" or "Governor Romer")[1] maintained an open line of communication through the press to the parents of Jefferson High students and the concerned citizens of the City of Los Angeles. Among the many issues Romer touched upon in his comments were the nature of the unrest, LAUSD's response, and the leadership qualities of principal Morrow.

Appellant filed suit against Governor Romer and the Los Angeles Unified School District (the "District") for, among other things, defamation and invasion of privacy. Appellant argues that consideration of the feelings of public school officials is a precursor to uninhibited communication with the public in times of crisis. This Court must reject such constraints and preserve the ability of LAUSD's administrators and representatives to exercise their free speech rights under the First Amendment by speaking to the press on matters of public concern without fear of civil liability. Students, parents, and taxpayers have a right to know what is going on in

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[1] Romer is the former Governor of Colorado.

the public schools, and the District should be able to tell them without facing frivolous lawsuits by disgruntled former employees.

Morrow's causes of action for invasion of privacy and defamation are based upon statements allegedly made by Romer that unquestionably involve Romer's exercise of his constitutional right to free speech on a matter of public concern. Those claims therefore are subject to California's anti-"SLAPP" (Strategic Litigation Against Public Participation) statute, codified at California Code of Civil Procedure section 425.16 ("Section 425.16" or the "anti-SLAPP" statute). As the Superior Court determined, under that statute, Respondents were entitled to an order striking Appellant's invasion of privacy and defamation claims from the Complaint, as well as a mandatory award of the attorney's fees and costs incurred in bringing the anti-SLAPP motion, because Appellant cannot establish a probability that he will prevail on those causes of action.

The reasoned judgment of the Superior Court should be affirmed.

STATEMENT OF APPEALABILITY

Respondents hereby adopt the Statement of Appealability set forth in Appellant's Opening Brief.

STATEMENT OF THE CASE

The Riots. A series of violent disturbances occurred on Jefferson High's campus in April and May 2005. (CT 8).[2] Each of these disturbances was rumored to have begun as a fight among a small group of students, but soon spread to a much larger group, which caused many to speculate that the violence was racially motivated. (SCT 3-28).[3] Parents and community activists demanded that the District take immediate action to quell the violence and prevent future outbreaks. (*Id.*).

Media Coverage. Jefferson High was the subject of pervasive media coverage during the period of unrest. The Los Angeles Times covered virtually every aspect of the student disturbances, as well as the District's response. (SCT 3-28). Appellant alleges that, in an article dated June 1, 2005, the Los Angeles Times reported that Governor Romer had voiced the need for stronger leadership at Jefferson High and saying in an interview that Morrow had retirement plans that did not fit with the District's needs and that Appellant's handling of the recent violence had accelerated a decision to replace him. (CT 9, 18). Appellant does not

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[2] The Clerk's Transcript, dated September 6, 2006, is referred to herein as "CT."

[3] The Supplemental Clerk's Transcript, containing Respondents' Request for Judicial Notice and Appendix of Non-California Authorities, and dated December 26, 2006, is referred to herein as "SCT." This Court has the authority to "judicially notice matters that were subject to discretionary notice by the trial court." *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 808 fn. 5.

allege any specific statement by Lagrosa, or any other employee of LAUSD.[4]

Appellant's Inability to Stem the Violent Tide. Because of the violence, Rowena Lagrosa ("Lagrosa"), who was the Local District Superintendent responsible for Jefferson High, spent a great deal of time at Jefferson High in April and May 2005. (CT 85). She formed the opinion that Appellant was not providing strong leadership as principal and therefore should be replaced at the end of the 2004-2005 school year. (*Id.*) She told her supervisor, Governor Romer that, because of Morrow's handling of the student disturbances, she had decided to replace him as the principal of Jefferson High in July 2005, at the end of the 2004-2005 school year. (*Id.*; CT 87-88). In her opinion and his, Morrow had to be replaced immediately because stronger leadership was needed at Jefferson High right away. (CT 85; 87).

Morrow Declares His Intent to Resign. After the second incident of student violence at Jefferson High in May 2005, Lagrosa met with Morrow to discuss his future plans. (CT 85-86). As Appellant acknowledges, Lagrosa told Morrow she had heard that he was planning to

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[4] Morrow does allege a statement by then Mayor-elect Antonio Villaraigosa, who was quoted in the Los Angeles Times as stating at a Board of Education meeting that "'My sense, frankly, is that things are out of control . . . I do not get the sense that anyone was in charge.'" (CT 9). Mayor Villaraigosa is not a defendant in this action; nor was he employed by the District at any time.

retire from the District and was looking for a new job and asked him to tell her what he was planning to do. (*Id.*). Morrow told her it was true that he was planning to retire from the District. (*Id.*). Appellant also said that he had researched his financial options and was planning to retire in January 2006. (*Id.*). Appellant told Lagrosa that he knew that Lagrosa would probably want a new team in place in July 2005, at the start of the 2005-2006 school year, and would not want the principal of Jefferson High to retire in January 2006, when the school year was in progress. (*Id.*). He also told her that, for financial reasons, he had to continue working for LAUSD until January 2006. (*Id.*). Lagrosa told him she could and would find work for him elsewhere in the District at his current salary until January 2006. (*Id.*). Morrow was replaced as principal of Jefferson High at the end of the 2004-05 school year and, true to her word, Lagrosa accommodated Morrow's desire to retire in January 2006 by finding him a temporary assignment (at full pay and full benefits) between July 1, 2005, and the end of January 2006.

Instant Lawsuit. Morrow subsequently filed the instant action against the District, Romer, and Lagrosa, alleging generally that he was constructively discharged by the District because of his age and race (Caucasian). (CT 4). The complaint also asserted causes of action for invasion of privacy (Count I) and defamation (Count VI), alleging that

Romer unlawfully commented to the press about Morrow and his retirement plans. (CT 11-12; 17-20).

Anti-SLAPP Victory. The Superior Court granted Respondents' special motion pursuant to Section 425.16 and issued an order striking Count I and Count VI of the Complaint on the grounds that (1) the statements complained of fell within the purview of Section 425.16(e) and (2) Appellant could not establish a probability of success on the merits of his claim. (CT 352-53).

This appeal followed.

STANDARD OF REVIEW

When evaluating the propriety of a trial court's order granting a motion to strike under Section 425.16, the appellate court conducts an independent review of the decision, essentially undertaking the same review as the trial court. *See Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807.

* * *

ARGUMENT

I. THE MEASURED JUDGMENT OF THE SUPERIOR COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

A. The Superior Court Applied the Proper Standards Under Section 425.16.

In considering a motion to strike under Section 425.16, a two prong test is employed. First, the court determines whether defendants have made a threshold showing that the challenged cause of action stems from protected activity, *i.e.,* that the plaintiff's cause of action involves the exercise of the defendant's free speech rights. *See Seelig*, 97 Cal.App.4th at p. 807. "[S]uch a threshold showing can be established in several circumstances, including if the party seeking the protection of the section demonstrates that it made the offending statement 'in a place open to the public or a public forum in connection with an issue of public interest.'" *Id.* (citation omitted). "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *See* Section 425.16(b)(2). Critically, California courts have held that the "public interest" requirement is to be "'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest." *Seelig*, 97 Cal.App.4th at p. 808; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175-76 (Section 425.16(e) must be given broad application in light of its purpose to protect Constitutional guarantees).

If the court finds that the claim in question does arise from the exercise of constitutional rights, then the burden shifts to the plaintiff to establish a probability that he will prevail on the claim. *See* Section 425.16(b)(1); *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646. The relevant standard is similar to the high showing required in motions for nonsuit, directed verdict, or summary judgment. *See Seelig*, 97 Cal.App.4th at p. 809. The plaintiff must literally be able to "plead and prove [a] prima facie case." *Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604, 616. Importantly, the burden placed on the plaintiff is purposely heavy:

> [A]n overly lenient standard would be wholly inappropriate, given that the statute is intended to "provid[e] a fast and inexpensive unmasking and dismissal of SLAPPs."

Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, 16 (citation omitted). Finally, the plaintiff cannot rely on the allegations in the pleading, but must present competent, admissible evidence. *See Church of Scientology*, 42 Cal.App.4th at p. 654-655.

B. The Superior Court Reached the Proper Conclusion That Appellant's Claims Violated the Anti-SLAPP Statute.

The Superior Court correctly found that "plaintiff's 1st and 6th causes of action fall within the purview of the anti-slapp statute." (CT 355). Appellant's meritless causes of action for invasion of privacy and defamation are precisely the sort of offending incursion into the sacrosanct

areas of free speech that the anti-SLAPP laws were adopted to prevent. The Superior Court recognized that nexus and properly struck the offending causes of action. The ruling should be affirmed.

Under Section 425.16, the requirement that defendant demonstrate that plaintiff's claim(s) implicate protected activity is satisfied if the claims are based on "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," ***or*** "any other conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest." *See* Section 425.16(e)(3)-(4).

The statements upon which Appellant's first cause of action for invasion of privacy and sixth cause of action for defamation are premised fall into at least one of these categories, if not both.

1. Romer's Statements Concerning the Unrest At Jefferson High and Appellant Concerned A Matter of Great Public Interest.

Consistent with the Superior Court's determination, Romer's statements undoubtedly qualify for protection under Section 425.16(e)(3) because the statements concerned a public issue—what the District was going to do about the series of violent disturbances at Jefferson High. (CT 357).

As noted by Appellant, there are generally three categories of statements that constitute a public issue or a matter of public interest for

purposes of Section 425.16: (1) statements that concern a person or entity in the public eye; (2) statements that concern conduct that could directly affect a large number of people beyond the direct participants; and (3) statements that concern topics of widespread public interest. *See Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 732, *revd. on other grounds Kibler v. Northern Inyo County Hospital District* (2006) 39 Cal.4th 192, 203 fn. 5);[5] *Rivero v. American Federation of State, County & Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 926. Romer's statements concerning Morrow in connection with the incidents at Jefferson High fall into all three of these categories.

First, Appellant, as principal of a large inner-city high school, was himself quoted in the Los Angeles Times on several occasions concerning student violence and the school's response. (SCT 3, 6-7, 8-9, 10-11, 16-17). Indeed, the entire City of Los Angeles had their eyes focused on the instability at Jefferson High and Appellant was the senior administrator on the ground. To contend, as Appellant does, that no scrutiny or attention

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[5] Appellant claims that *Fontani* was annulled by the California Supreme Court and is of force or effect. *See* Opening Brief at 43. This is incorrect. *Fontani* was disapproved of by *Kibler v. Northern Inyo County Hospital District* (2006) 39 Cal.4th 192, but for an exceedingly narrow reason and with regard to a particular subsection of Section 425.16 not applicable to the instant case. *See Kibler*, 39 Cal.4th at p. 203, fn. 5 (questioning the *Fontani* court's interpretation of the phrase "official body").

otherwise would have been paid to him during this time of City emergency borders on the absurd.

Second, the series of fights that occurred at Jefferson High clearly impacted thousands of students and their families, as well as the surrounding community, and was generally a matter of widespread public interest, as evidenced by the extensive press coverage and the involvement of many civic leaders, including Mayor-elect Villaraigosa. (SCT 3-28).

Third, the public was likely even more concerned with the District's response to the incidents, which included, among other things, changing principals at Jefferson High. Certainly, Romer's statements about Morrow involved more than just Romer and Morrow themselves. *See Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1047, fn. 5 (appellate division recognizing that the financial well-being and integrity of a recognized branch of a large, publicly-funded university medical school were legitimate matters of public concern).

Indeed, topics of far less concern to the public have been found to meet the public interest standard required for an anti-SLAPP motion under Section 425.16. For instance, in *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, a general manager of a homeowner's association sued other association members based on purportedly defamatory statements made at association board meetings and in an association newsletter. Despite the fact that the newspaper in question

"was essentially a mouthpiece for a small group of homeowners," the court of appeal affirmed the trial court's granting of the defendants' anti-SLAPP motion, holding that the defendants' statements to the newspaper were made "in a place open to the public or a public forum in connection with an issue of public interest." *Damon*, 85 Cal.App.4th at p. 474, 476 (internal quotations and citation omitted).

In this case, there can be no doubt that Romer's statements to the Los Angeles Times were about a matter of public interest. Indeed, if statements made to a reporter for a homeowner's association newsletter are protected by the anti-SLAPP statute, it stands to reason that statements made to reporters for the Los Angeles Times by Governor Romer, the Superintendent of one of the largest school districts in the country, concerning shocking student violence at a major urban high school, qualify for protection, as well. Indeed, debate over public issues, including the qualifications and performance of public officials, such as a school administrator, "lies at the heart of the First Amendment." *See Leventhal v. Vista Unified School District* (S.D. Cal. 1997) 973 F.Supp. 951, 958.

2. Romer's Statements Were Made In A Public Place And/Or Public Forum.

Each of the statements in question were made by Governor Romer to, and printed in, the Los Angeles Times. The anti-SLAPP statute applies to statements made to the press, as well as private conversations with

newspaper reporters. *See Sipple v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 239; *Averill*, 42 Cal.App.4th 1170 at p. 1175. Appellant even concedes the breadth of the Los Angeles Times dissemination, referring to it as "a newspaper of general circulation." *See* Opening Brief at 45. Thus, the statements made by Romer were made in a public forum or in a venue open to public debate and therefore were subject to Section 425.16.

Appellant takes issue with this conclusion and argues that "[i]n this case, there was no exchange of information." *See* Opening Brief at 25. Surely, curtailment of the right to free speech is not justified where no one chooses to respond to the offered statements. Also mentioned above, Appellant had been quoted in the Los Angeles Times before and therefore enjoyed the option of responding to Romer's statements. (*See* SCT 3, 6-7, 8-9, 10-11, 16-17).

Under these facts, there is little doubt that the court below correctly concluded that Romer's statements were protected under Section 425.16 as statements made in a public forum in connection with a matter of public interest, as well as speech in furtherance of his right to free speech. Furthermore, as the court below correctly observed, "the acts of which plaintiff complains were taken in furtherance of defendant's right of free speech under the U.S. Constitution in connection with a public issue." (CT 357). Neither of Appellant's principal cases in opposition compel a

different conclusion and the Superior Court's reasoned judgment should not be disturbed.

With regard to the first citation, to the recent U.S. Supreme Court case of *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951, Appellant quotes the holding in a misleading fashion by providing only an abridged quotation: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes..." *See* Opening Brief at 30 (emphasis in original). Had Appellant provided the entire quote (as it appears below), instead of cutting it short with an ellipses, the inapplicability of *Garcetti* would have been crystal clear:

> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution **does not insulate their communications from employer discipline**.

Garcetti, 126 S.Ct. at p. 1960 (emphasis added). *Garcetti* concerns when and under what circumstances public employees may be disciplined by their employers for statements made pursuant to their official duties. It has no applicability to this case.

Appellant's reliance on the holding of *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107 is equally misplaced. *Du Charme* does not alter the foregoing analysis

because that case, which held the anti-SLAPP statute inapplicable to certain statements posted on a website, was limited by the court to "cases where the issue is not of interest to the public at large." *Id.* at p. 119. In the instant case, the riots at Jefferson High affected the entire City of Los Angeles and generated extensive media coverage. Another factor further removing the instant case from that of *Du Charme* is that court's conclusion that the offending web posting was "unconnected to any discussion, debate or controversy." *Id.* at p. 118. By contrast, a public debate was raging as to the causes of the violence at Jefferson High and the District's reaction.

The Superior Court found that the facts underlying Counts I and VI fall with the purview of California's anti-SLAPP statute because Governor Romer's statements constituted (i) speech in a public forum or place concerning a matter of widespread public interest, and (ii) conduct in furtherance of the exercise of free speech in connection with a public issue. (CT 357-58). Appellant has made no showing that the judgment of the court below should be disturbed.

C. Appellant Cannot Invoke Any Statute or Rule to Defeat the Application of Section 425.16.

1. Appellant's Brown Act Theory Is A Red Herring.

California Government Code section 54957 ("Section 54957") is part of the Brown Act, which is commonly referred to as the "sunshine law" because it requires open, public meetings by governmental entities.

See Gov. Code, § 54953; *Leventhal*, 973 F.Supp. at p. 959. Section 54957 is an exception to the Brown Act. It provides, in relevant part:

> Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions . . . to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

Gov. Code, § 54957(b)(1). This section has become known as the "personnel exception" to the Brown Act. *See San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 954.

Nothing in Section 54957 supports Appellant's assertion that Respondents were somehow prevented from discussing his "performance" outside of a closed Board of Education meeting. In fact, the opinion in *Leventhal* specifically disapproves of such a concept:

> Although § 54957 allows public employees to demand that a governing body air complaints about the employee in public, **it does not grant the employees the right to force the conflict behind closed doors.**

Leventhal, 973 F.Supp. at p. 958 (emphasis added). The *Leventhal* decision completely upends Appellant's central theory – that public employees can silence comment about their performance in connection with a public issue.

Appellant's attempts to distinguish *Leventhal* are unsuccessful. For example, Appellant claims that *Leventhal* applies only to the rights of

members of the public to address the Board of Education, not to the rights of the Superintendent of Schools to address the public. *See* Opening Brief at 40-41. Such a trivial and immaterial distinction finds no buttressing by the case itself. To the contrary, the *Leventhal* court was concerned not with the *speaker* but with the *restriction*, ruling that the Board of Education's bylaw that restricted public comment on the performance of school district officials was "content-based regulation" that could not withstand Constitutional scrutiny. *See Leventhal*, 973 F.Supp. at pp. 957, 960.

In essence, Appellant is asking this Court to adopt a similar content-based restriction on the ability of District leaders to engage in uninhibited communications with the public concerning issues of public concern that may touch incidentally upon the performance of a District employee. As the *Leventhal* court noted, "[d]ebate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment." *Id.* at p. 958. In the end, Appellant cannot use a tortured interpretation of the Brown Act to limit those freedoms guaranteed by the First Amendment in an effort to "silence public speech that may also touch upon related employment issues." *Id.* at p. 958.[6]

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[6] Appellant invokes recently-enacted section 54963 of the Brown Act and argues that the decision in *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324 provides support for Appellant's position. *Kleitman* is not only irrelevant for the purposes of an invasion of privacy claim, but, as

2. Appellant's Assorted Theories Seeking to Cast Romer's Statements As Inappropriate, Illegal, or Tortious Are Irrelevant As A Matter of Law.

The fact that Appellant *claims* Romer's statements were defamatory, wrongful or otherwise illegal (Opening Brief at 33-34) does not impact the analysis, under prong one, of whether the challenged statements fall within the purview of Section 425.16. *See Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245-46 ("[m]ere allegations that defendants acted illegally [ ] do not render the anti-SLAPP statute inapplicable."); *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 909-910. Even in cases where the legality of the challenged behavior is in legitimate dispute, the anti-SLAPP law still applies. *See Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 460 ("Thus, with the legality of appellant's exercise of a constitutionally protected right **in dispute** in the action, the threshold element in a section 425.16 inquiry has been established.") (emphasis added), *distinguishing Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356.

(continued...)

Appellant concedes, it was decided **prior to enactment of section 54963**. *See* Opening Brief at 19.

Appellant relies erroneously on the recent California Supreme Court case of *Flatley v. Mauro* (2006) 39 Cal.4th 299, 316 and on *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356.

In *Flatley*, the Supreme Court, citing the *Paul* decision, ruled that defendant's acts that formed the basis of the plaintiff's lawsuit constituted extortion *as a matter of law* and affirmed the trial court's denial of the anti-SLAPP motion. *Flatley*, 39 Cal.4th at p. 330. However, the *Flatley* court took care to limit its holding to cases where "either the *defendant conceded*, or the *evidence conclusively establishes*, that the asserted protected speech or petition activity was illegal as a matter of law." *Id.* at p. 320 (emphasis added). The language utilized by the Court left no doubt that the case before it was unique:

> We emphasize that our conclusion that Mauro's communications constituted criminal extortion as a matter of law are based on **the specific and extreme circumstances of this case**.

Id. at p. 332 (emphasis added).

In our case, Respondents' concede no illegality and believe that the evidence conclusively establishes, as the Superior Court concluded, that Appellant has no probability of succeeding on the claims. (CT 352-53). Even the *Flatley* decision recognized the limited applicability of *Paul*, noting, "*Paul* emphasized the narrow circumstances in which a defendant's asserted protected activity could be found illegal as a matter of law and

therefore not within the purview of section 425.16." *Flatley*, 39 Cal.4th at p. 315.

A useful illustration of the critical difference (lost on Appellant) between the instant case and the "extreme circumstances" of *Flatley* and *Paul* is the *Gray Davis* case. In *Gray Davis*, the trial court denied defendant's anti-SLAPP motion and the defendant appealed. Plaintiff defended the trial court's ruling by citing to the *Paul* decision. *Id.* at p. 458. The court of appeal reversed and instructed the trial court to grant the anti-SLAPP motion. *Id.* at pp. 472-73. The *Gray Davis* court distinguished *Paul* from the facts before it, noting that, "in contrast, appellant neither has conceded nor does the evidence conclusively establish the illegality of its communications." *Gray Davis*, 102 Cal.App.4th at p. 459. The party in the *Paul* case *conceded the illegality of his communications*, while in *Gray Davis* and the instant case, the moving parties vigorously contest any illegality and the evidence does not conclusively establish any illicit activity.

If the Appellant's recitation of the law were correct, any plaintiff could defeat any anti-SLAPP suit with mere allegations that the challenged activity was illegal. Without a *conclusive* showing, the fact that Appellant *considers* the alleged statements illegal cannot prevent application of

Section 425.16 under the first prong of the analysis.[7] Therefore, both *Flatley* and *Paul* are completely distinguishable as cases set apart by their unique facts.

Given the foregoing, Appellant cannot prevail in this appeal merely by arguing that the alleged statements by Romer:

- Ran afoul of a nebulous privacy right (Opening Brief at 21),
- violated the Collective Bargaining Agreement between certain employees and the District (*Id.* at 15-16),
- were prohibited as a matter of law (*Id.* at 33-38), or
- should have been made behind closed doors (*Id.* at 17).

Nor can Appellant avoid the application of Section 425.16 by arguing that Respondents have not demonstrated that Romer's statements are definitely protected by the Constitution. *See* Opening Brief at 38. The California Supreme Court in *Navellier v. Sletten*, a case cited by Appellant as authoritative for anti-SLAPP purposes, held that such a showing is not only *unnecessary* but *contrary* to the legislative intent of the statute:

> The legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First

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[7] Appellant's musings at pages 35-40 of his Opening Brief do not constitute appropriate argument. There, Appellant appears to engage in a one-sided, Socratic-method discussion on how the challenged statements do not qualify for protection under Section 425.16. None of his thoughts are persuasive and wondering aloud does not constitute appropriate argument.

> Amendment as a matter of law. If this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous.

Navellier v. Sletten (2002) 29 Cal.4th 82, 94-95 (internal quotations and citations omitted).

Appellant's approach, which would obviate the need for the second half of the analysis, has been expressly disapproved by the high court.

* * *

Considering the foregoing, the Superior Court's conclusion that Romer's statements fall within the protective sweep of California's anti-SLAPP statute was undoubtedly correct. Furthermore, as demonstrated below, the Superior Court acted judiciously in ultimately striking the offending causes of action because it was clear that Appellant did not (and cannot) present competent, admissible evidence establishing a probability of success on the merits of the stricken claims.

II. THE SUPERIOR COURT'S FINDING THAT PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON EITHER THE DEFAMATION OR INVASION OF PRIVACY CLAIM IS WELL-SUPPORTED AND ENTIRELY PROPER.

The Superior Court correctly concluded that Appellant enjoyed no realistic chance of success on either contested claim and, therefore, that the initial conclusion that the targeted comments fell within the purview of the anti-SLAPP statute compelled the striking of both counts. (CT 355-56).

A. Appellant's Privacy Claim Contained in Count I Is A Fiction; Completely Unsupported By California Law.

Appellant's creative invasion of privacy claim is unsupported by case law or statute, and defies public policy and common sense. Count I of the Complaint for invasion of privacy asserts that Defendants "publicly disclos[ed] to the Los Angeles Times and other publications, Plaintiff's performance as Principal of Jefferson High School." (CT 11). In this regard, Appellant incorporates by reference and relies upon the statements allegedly made by Romer to the Los Angeles Times set forth above.

1. Appellant's "Privacy" Was Not Invaded.

The Superior Court explicitly concluded that "no private facts were disclosed about plaintiff, and even if they were, plaintiff has failed to demonstrate that the facts were not legitimate public concern." (CT 357-58). Appellant has failed to better his showing in this Court.[8] The claim fails as a matter of law.

The common law claim of invasion of privacy as recognized in California is comprised of four separate torts: (1) intrusion into private affairs, (2) public disclosure of private facts, (3) publication of statements placing an individual in a false light, and (4) appropriation of an

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[8] In attempting to establish a probability of success on the merits of his nebulous privacy argument, Appellant devotes all of two paragraphs in his submission. *See* Opening Brief at 45.

individual's likeness. *See Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1482.

The first and fourth of these do not apply to the facts of this case, as no intrusion or appropriation is alleged. Moreover, Appellant cannot maintain a cause of action for public disclosure of private facts because, as the court below recognized, Romer's statements do not reveal anything "private" about him and, even if they did, Appellant failed to show that such private facts were not newsworthy, which they were. *See Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215; (CT 357-58).

Similarly, the statements Appellant has alleged do not support a "false light" claim because, again, they do not concern anything "private," but rather they concern his professional standing. *See Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 767. Nor do the challenged statements falsely imply adherence to a belief system or controversial opinion. Simply stating that "stronger leadership is needed," that Appellant "had retirement plans that did not fit with the District's needs," and that Appellant's handling of the April and May 2005 student disturbances had "accelerated" a decision to replace him can hardly be characterized as the disclosure of "private information." Furthermore, consider the public policy ramifications of accepting Appellant's argument: during a time of crisis, a public official in California would be restrained from free and

robust communication with the public. This Court should not sanction or fashion such a rule.

2. Appellant Does Not Assert A Claim For Relief Under The Collective Bargaining Agreement, Thereby Rendering It Completely Irrelevant.

The Court should not be misled by Appellant's repeated invocations of the collective bargaining agreement between the District and certain district administrators (the "CBA"). (CT 216). Appellant's attempts to characterize Romer's statements as some sort of quasi-evaluation that would have to adhere to the provisions of the CBA is pure fiction. *See* Opening Brief at 16 ("Romer's statements to the Los Angeles Times violated the understanding" between the union and the District). None of Appellant's arguments concerning the CBA impact the foregoing analysis, and in many instances, Appellant's reading of the CBA is misleading. For example, Appellant claims that paragraph 4 of section VIII of the CBA "requires complete confidentiality until resolution of the dispute." *See* Opening Brief at 16. However, that confidentiality is only triggered "from the time a grievance is filed" (CT 244) and there is no evidence that Appellant filed a grievance.

A review of the CBA reveals no provision that purports to restrain any District official, especially the Superintendent of Schools, from interacting with community stakeholders about any topic, particularly one so newsworthy as violence on a school campus and LAUSD's response.

3. None of Appellant's Other Assorted Sources of Privacy Defeat Application of the Anti-SLAPP Statute.

Appellant also invokes the Constitution (Opening Brief at 21-22) and the California Public Records Act (*id.* at 19-21) as last ditch efforts to avoid the application of Section 425.16. Once again, he is wrong on the facts and the law.

First, the California Public Records Act (the "CPRA"), codified at California Government Code section 6254(c), provides that personnel ***files*** are exempt from disclosure. The CPRA does not purport to exempt any and all information concerning personnel because such a standard would be unworkable. As the CPRA is silent when it comes to verbal communication, it cannot restrain the Superintendent of Schools from engaging in communication in the public interest any more than the CBA can.

Appellant's fiction that Romer accessed, then disclosed, confidential information from Appellant's personnel file finds no support in the factual record. The record establishes that Appellant disclosed his intention to retire in January 2006. (CT 85). Appellant may not avail himself of the provisions of the CPRA because there are no personnel records involved in this case.

Second, no constitutional provision is implicated in this case. Despite arguing, in a single paragraph, that "Appellant has a

constitutionally based liberty interest in his good name," Appellant neglects to provide any analysis or argument as to the operation of such a liberty interest in this case. *See* Opening Brief at 21-22. The statements about his performance simply are not "private" as a matter of law, and even if they were, such privacy concerns are trumped by the fact that his performance is newsworthy. *See Patton*, 263 Cal.App.2d at p. 767 (statements regarding professional standing are not "private"); *Shulman*, 18 Cal.4th at p. 215.

Appellant's *modus operandi* of citing common law, contractual and constitutional principals without exploration or explanation does not substitute for a well-reasoned argument. This and other constitutional claims must be rejected.

* * *

Because none of Section 54957, the CBA, or any other constitutional, statutory or common law principle supports Morrow's cause of action for invasion of privacy, Appellant cannot show a likelihood that he will prevail on the merits of Count I and the Superior Court was right to strike the claim. The decision should be affirmed.

B. The Superior Court Correctly Concluded That Appellant's Defamation Claim Is Meritless.

The Superior Court ruled that "plaintiff has failed to meet his burden of showing that he is likely to prevail" on his defamation claim. (CT 355). From a threshold standpoint, dismissal of the defamation claim is required

because Governor Romer's statements were absolutely privileged. In addition, Morrow, a public official and/or figure, cannot show that Governor Romer made the challenged statements with actual malice, and, in any event, the statements were pure opinion and therefore not actionable.

1. Statements by the School District Superintendent Made During A School District Emergency Are Rightfully Privileged Under California Law.

The court below left little doubt that Governor Romer's statements were privileged under California law. (*See* CT 357: "Romer's statements regarding school violence and the principal were privileged…[because] the statements were made in the discharge of his official duty as superintendent of the LAUSD"). As such, Count VI must fail because Romer's statements concerning Appellant to The Los Angeles Times were made in his capacity as LAUSD's Superintendent of Schools and therefore were absolutely privileged under the official duty privilege codified in California Civil Code section 47(a) ("Section 47(a)").

In pertinent part, Section 47(a) states, "A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty." The privilege conferred is absolute; it is not affected by malice or other bad motive of the speaker. *See Saroyan v. Burkett* (1962) 57 Cal.2d 706, 710. The purpose of the absolute privilege conferred by Section 47(a) "is to insure efficiency in government by encouraging *policy-making* officials to exercise their best judgment in the performance of their duties free from

fear of general tort liability." *See Sanborn v. Chronicle Publishing Co.* (1976) 18 Cal.3d 406, 413 (emphasis in original).[9]

It undeniably was part of Governor Romer's duty to report to the community about controversial incidents, such as the outbreaks of violence at Jefferson High. (*See* CT 87: "As Superintendent of Schools for LAUSD, I am ultimately responsible for the relationship between the District and the public."). Even more central to Romer's duty is his obligation to report LAUSD's *response* to such an incident, which involved changing principals at Jefferson High. As Superintendent, Romer was absolutely privileged to report to the public on this important matter without fear of reprisal through litigation by a disgruntled public employee.

Moreover, the privilege applies to governing boards of school districts. *See Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 501 (statements by school district trustees were absolutely privileged as

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[9] Appellant cites *Sanborn* for the proposition that a public official must be exercising policy-making functions to be protected by the absolute privilege and argues that Romer has no involvement in policy-making and acted "in excess of the official's authority." *See* Opening Brief at 56. Again, as Superintendent, one of Romer's functions was to communicate to the public, and especially to parents, in a time of campus crisis. For Appellant to argue that the Superintendent is essentially a powerless bureaucrat with no discretion is facetious and hardly worthy of consideration. As Governor Romer testified in his Declaration: "It is my official duty to communicate with the press about LAUSD matters that I consider to be of concern to the public and, in the event of student violence at a LAUSD school, it is my official duty to let the general public know what the LAUSD is going to do about it." (CT 87).

discharge of official duty under Section 47(a)). Because Governor Romer is by law the Chief Executive Officer of the school board, he enjoys the immunity as well. *See* Ed. Code, § 35035 ("The superintendent of each school district shall, in addition to any other powers and duties granted to or imposed upon him or her: (a) *Be the chief executive officer of the governing board of the district.*") (emphasis added). Thus, Governor Romer enjoys an absolute privilege for his official communications as either the Superintendent of Schools and/or as a member of the Board of Education.

The opinion in *Santavicca v. City of Yonkers* (N.Y. App. Div. 1987) 132 A.D.2d 656 is persuasive given the similarity of facts. There, the New York appellate division held that a superintendent's statements to the press concerning the death of a high school football player and the steps being taken to address the incident, which included reprimand of the football coach, were privileged and immune from a claim of defamation brought by the coach. *Id.* at p. 657. In startling similarity to the facts of the case at bar, the court held that the superintendent's statements were privileged "because of the interest in providing the public with information as to *what steps were being taken to prevent reoccurrence of the tragic incident....*" *Santavicca*, 132 A.D.2d at p. 657 (emphasis added).[10]

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[10] While *Santavicca* is an opinion from the courts of New York and admittedly not mandatory authority, considering its factual similarity, its reasoning and result should certainly be viewed as compelling, as other New York cases have been in the past. *See, e.g., Royer*, 90 Cal.App.3d at p.

Like the superintendent in *Santavicca*, Defendant Romer was discharging his official duty to communicate with the public about the incidents at Jefferson High when he made the statements concerning Appellant. Romer was quoted in his capacity as Superintendent of Schools, and he was commenting on issues pertaining to LAUSD and its response to a controversial outbreak of student violence, a matter properly within his sphere of authority. *See Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1294 (official duty privilege applied to press conference by district attorney in which he alleged violations of the Brown Act).[11]

Governor Romer's statements therefore are entitled to the absolute privilege, and the Court should affirm the conclusion of the court below that Appellant has no hope of prevailing on Count VI for defamation under California law.

(continued...)

502 (in an action for defamation involving the application of privilege, the California court of appeal quoted favorably from and relied upon the New York case of *Lombardo v. Stoke* (1966) 18 N.Y.2d 394, where "the New York Court of Appeals was confronted with a case virtually on all fours with the present one").

[11] Appellant attempts to distinguish *Ingram* by arguing that the case dealt only with establishing who is a proper defendant. *See* Opening Brief at 43. However, Appellant cannot escape the fact that *Ingram* stands for the proposition that public officers like Governor Romer are protected by Section 47(a) for statements made in the discharge of official duties.

2. Appellant, A Public Official/Figure Within the Meaning of Defamation Law, Has Not And Cannot Show that Romer Acted With Actual Malice.

Under the relevant standards articulated by the United States Supreme Court in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, and *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, a public official, public figure, or limited purpose public figure who brings an action for defamation must establish that the defendant acted with actual malice in order to recover for harm to their reputation.[12] Aptly applying these concepts, the Superior Court found that "Norman Morrow, principal of Jefferson High School was a public figure and in the alternative, at a minimum, a limited public figure" for the purposes of defamation law. (CT 357).[13]

Appellant seeks to avoid the Herculean task of demonstrating actual malice by arguing that he is neither a public official nor a public figure, but

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12 Under the *New York Times* rule, there are two kinds of "public figures": (1) "all purpose public figures" who have achieved such pervasive fame or notoriety that they become a public figure for all purposes and in all contexts, and (2) "limited purpose public figures," who voluntarily inject themselves or are drawn into a particular public controversy and thereby become a public figure for a limited range of issues. *See Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1163.

13 Appellant cites to exhibits 6 (an NPR broadcast) and 7 (District board meeting minutes) of his Request for Judicial Notice at pages 48 and 49 of his Opening Brief, respectively. However, the Court denied Appellant's Request for Judicial Notice as to these documents, which were not in the record in the court below, and therefore all references to and quotations of this material are inappropriate and cannot be relied upon. The Court should strike these and any similarly offending paragraphs.

merely "one of thousands of middle administrative personnel employed by LAUSD." *See* Opening Brief at 50 (emphasis in original). Appellant's humility is unpersuasive.[14]

The overwhelming majority of jurisdictions, state and federal, hold that a public school principal is a public official and/or limited purpose public official for the purposes of defamation analysis. *See Lorain Journal Co. v. Milkovich* (1985) 474 U.S. 953, 959-960 (Supreme Court holding that a public school teacher is a public official for defamation purposes); *Johnson v. Robbinsdale Independent School District* (D.Minn. 1993) 827 F.Supp. 1439, 1443 ("public school principals criticized for their official conduct are public officials for purposes of defamation law"); *Jee v. New York Post Co., Inc.* (N.Y. Sup. Ct. 1998) 176 Misc.2d 253, 259 ("a public school principal is a public official for the purposes of the defamation law"); *Palmer v. Bennington School District, Inc.* (1992) 159 Vt. 31, 35 ("We agree with the trial court that a public school principal is a public official subject to the *New York Times* standard of actual malice..."); *State v. Defley* (La. 1981) 395 So.2d 759, 761 ("A school superintendent **and school supervisor** would both be considered public officials...") (emphasis

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[14] For support, Appellant cites *Franklin v. Benevolent and Protective Order of Elks, Lodge No. 1108* (1979) 97 Cal.App.3d 915, which held that a high school *teacher* was not a public figure. The case did not involve a principal, who obviously carries out control and decision-making functions separate and apart from teachers.

added); *Kapiloff v. Dunn* (1975) 27 Md.App. 514, 524 ("It is plain that as a high school principal…Dunn was within the public figure-public official classification and that his suitability for the position was a matter of public or general interest or concern. The right of Dunn to recover for any injury to his reputation by the libel here must be tested by the *New York Times* standard").

In case after case, courts holding that principals are public officials or figures for the purposes of defamation law point to the control, decision-making and public trust invested in principals, and the reliance placed upon their judgment and discretion by staff, students, parents and teachers. *See*, *e.g.*, *Johnson*, 827 F.Supp. at p. 1443 ("It is undisputed that Johnson, as school principal, managed teachers and other school employees **and at least appeared to the public to be the person in charge of operating the school**") (emphasis added); *Jee*, 176 Misc.2d at p. 259 ("Public school principals play an important role in shaping and administering the educational process. They supervise teachers and other staff as well as bear the ultimate responsibility for the welfare of the students at their school during the school day.").

Given the standing of school principals in our society, courts recognize that leaders such as Appellant may come under scrutiny in public debate and discussion. *See*, *e.g.*, *Johnson*, 827 F. Supp. at p. 1443 ("public school principals criticized for their official conduct are public officials for

purposes of defamation law. **A contrary holding would stifle public debate about important local issues.**") (emphasis added). It is difficult to conceive of a more important local issue to the people of the City of Los Angeles than the well-being of thousands of public school students embroiled in the midst of a race riot. Despite his demurrers (Opening Brief at 50-53), Appellant cannot avoid such scrutiny.

Furthermore, it is no defense for Appellant to claim, as he does, that he was unfairly dragged into the spotlight. *See* Opening Brief at 50-52. As articulated by the United States Court of Appeals for the Seventh Circuit, criticism of a public official like a school principal is part and parcel of legitimate public debate and exchange of information:

> [Principal] relies on *Hutchinson v. Proxmire* [ ] for the proposition that public criticism does not transmute the target into a 'public figure.' Granted. But [principal] was a public *official* – just like the commissioner who supervised the police department in *New York Times v. Sullivan* – whether or not she was a public figure. Her performance as a public official was open to public comment.

Stevens v. Tillman (7th Cir. 1988) 855 F.2d 394, 403. Appellant attempts to distinguish *Stevens* on the grounds that the decision "did not address privacy rights established by the California Constitution, the Brown Act, the California Public Records Act or the CBA." *See* Opening Brief at 44. Considering that *Stevens* goes to the question of defamation (which is

clearly relevant) and directly rebuts one of Appellant's principal arguments, Appellant's effort at reducing the import of the decision is unpersuasive.

Moreover, California courts are on record holding that the actual malice standard applies in any defamation action brought by a plaintiff who occupies a public position that carries the potential to impact a large number of people. *See Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1611 (the "touchstone for public official status" is the "extent to which the plaintiff's position is likely to attract or warrant scrutiny by members of the public," either because of the "prominence of the position in the official hierarchy, or because the duties of the position tend naturally to have a relatively large or dramatic impact on members of the public"). Public school principals undeniably exercise vast and nearly unfettered control over their schools. *See Bright v. Los Angeles Unified School District* (1976) 18 Cal.3d 450, 466 ("It is true as urged by defendants that…school officials have authority to control commercial conduct on school premises.").

Given Appellant's position of prominence in the Jefferson High community, this Court should hold Appellant to the same Constitutional standards as other jurisdictions hold their principals and find that Appellant must produce clear and convincing evidence that Governor Romer knew the statements were false or acted with reckless disregard of the truth before permitting him recovery on a defamation claim.

Not surprisingly, Appellant cannot (nor does he try to) make such a showing. In fact, Appellant spends little ink on the question of actual malice, alleging in one place that "Romer knew of the falsity" of the statements and "acted recklessly in disregard of those matters" (Opening Brief at 51), and in another that, "[e]ven if this Court finds that Appellant was a public figure or public official, he has shown that the statements were false, and made with reckless disregard as to their truth or falsity." *Id.* at 63. Shown where? Neither reference carries a citation to the record. Appellant's effort is no better or detailed than conclusory allegations one might expect to find in a complaint.

To be sure, no litigant relishes establishing actual malice, and few actually succeed. However, Appellant's avoidance of the subject is lethal to his cause. Where the plaintiff in a defamation held a position like Appellant's, the Constitution of the United States requires him to either demonstrate that the challenged statements were false *and* made with a reckless disregard for the truth, or grow thicker skin.

3. Romer's Statements To The Press Constituted Pure Opinion And Therefore Are Not Actionable.

Appellant alleges that Governor Romer told the Los Angeles Times the following:

- "[S]tronger leadership was needed at Jefferson" and,

- "Plaintiff 'had retirement plans that did not fit with the District's needs,' and that the Plaintiff's handling of the April and May 2005 disturbances had 'accelerated' a decision to replace him . . .."

(CT 9, 18).

It has been said many times that, under the Constitution of the United States, there is no such thing as a false idea. Thus, an independent reason why Appellant has no probability of success on Count VI is that Romer's statements constituted pure opinion.

As recognized by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 1418 U.S. 323 (1974), a statement is not defamatory, and therefore not actionable as a matter of law, if it constitutes opinion. *See also Jensen v. Hewlett Packard Co.* (1993) 14 Cal.App.4th 958, 971 (to give rise to liability for defamation, a publication "'must contain a false statement of fact'") (citation and quotation omitted). Appellant claims that Romer's comments were "per se defamatory," but provides no case law supporting such a contention.

The statements at issue, for example, that "stronger leadership" was needed at Jefferson High, are classic statements of opinion. *See Moyer v. Amador Valley Joint Union High School District* (1990) 225 Cal.App.3d 720, 725 (statement that plaintiff was a "babbler" and the "worst teacher" were subjective expressions of judgment and therefore not actionable).

Appellant's position that his strength as a leader is irrefutable, undeniable and provably true is contrary to logic. In fact, assessment of such a trait is, by its very nature, completely subjective. *See, e.g., Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1554 (statements about plaintiff's unsuitability for teaching position were not actionable as slander or libel but rather protected opinions as to her fitness). Governor Romer's comments about Morrow's leadership skills contain no factual assertions that are capable of being proved true or false, but instead are "an expression of subjective judgment." *See Moyer*, 225 Cal.App.3d at p. 725.

Governor Romer's other statement – that Morrow "had retirement plans that did not fit with the District's needs" and that his handling of the student violence had "accelerated" a decision to replace him – is not actionable because it is a statement of Romer's opinion that the District needed to replace Morrow as the principal of Jefferson High right away. (CT 87: "It was my opinion that Mr. Morrow had to be replaced in June because stronger leadership was needed at Jefferson right away."). Certainly, Appellant was free to tell the public that his retirement plans *were* consistent with the District's needs, but he chose not to, despite being quoted in the Los Angeles Times on several occasions during the unrest. (SCT 3, 6-7, 8-9, 10-11, 16-17).

To reject Appellant's argument is to acknowledge the obvious fact that reasonable people can disagree as to both Appellant's performance and

the District's staffing needs. Therefore, such statements are protected by the First Amendment and are not actionable as defamation. *See, e.g., Botos v. Los Angeles County Bar Assn.* (1984) 151 Cal.App.3d 1083, 1088-1090 (rating of judge as "not qualified" by local bar association was a collective judgment of the judge's qualifications and not an actionable statement of fact).

Furthermore, far from the careless, generalized personal attack that was the subject of the ancient case of *Oberkotter v. Woolman* (1921) 187 Cal. 500 cited and relied upon by Appellant, (Opening Brief at 49-50), Romer leveled legitimate criticism in the form of a constitutionally protected opinion. Moreover, the *Oberkotter* court merely ruled that plaintiff was permitted to proceed past *demurrer* on the claim that the defendant's act of referring to plaintiff as a "weak spot" damaged plaintiff's reputation. *Oberkotter*, 187 Cal. at p. 503. Unlike the summary judgment-like setting here, a demurrer does not test the probability of success, rather it measures the bare legal sufficiency of the causes of action as stated. *See, e.g., Seelig*, 97 Cal.App.4th at p. 809 (the relevant standard under Section 425.16 is similar to the high standard used in deciding motions for nonsuit, directed verdict, or summary judgment).

A false statement of fact is the *sine qua non* for recovery in a defamation action. When Romer's statements are evaluated in their totality,

free of Appellant's spin and conjecture, they are revealed to be pure opinion and therefore cannot qualify as defamatory statements under California law.

* * *

Accordingly, because (i) California statute confers an absolute immunity upon the challenged statements, (ii) Appellant cannot (and in fact does not try to) establish that Romer's statements were made with actual malice, and (iii) the comments constituted pure opinion and therefore were not defamatory as a matter of law, Appellant enjoys no probability of success on Count VI and the decision of the Superior Court should be affirmed.

III. THE TRIAL COURT PROPERLY SUSTAINED OBJECTIONS TO APPELLANT'S DECLARATION.

The Superior Court properly sustained Respondents' objections to certain paragraphs of Appellant's Declaration (the "Declaration") submitted in opposition to Respondents' special motion to strike. (*See* RJN 4). The Superior Court sustained the majority of the objections because the Declaration was rife with inappropriate statements and inadmissible testimony. (*See* RJN 2).[15] For instance, Appellant: contended that

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[15] Appellant argues in section III.C. of his Opening Brief that the Court struck portions of the Declaration on the grounds that it was not signed and/or timely. *See* Opening Brief at 60. This is demonstrably untrue. We invite the Court's attention to CT 355-56, the Superior Court's order granting the motion to strike, in which the court specifically *overruled* the objections to the Declaration on the grounds that it was unsigned and untimely: "The defendants' objections to the plaintiff's declaration

Governor Romer could read the minds of thousands of LAUSD employees (*Id.* at ¶ 7), interpreted the legal import of portions of the collective bargaining agreement (*Id.* at ¶ 8), reported that the entire staff of Jefferson High, including security officials, verbally criticized Governor Romer for his alleged statements (*Id.* at ¶ 10), and imputed to Respondents Romer and Lagrosa (who has no legal training whatsoever) intimate knowledge of the California Government Code (*Id.* at ¶ 29).

Seeking to reverse the Superior Court's judgment in excluding the foregoing testimony, Appellant argues that the trial court cannot weigh the evidence in deciding a special motion to strike under Section 425.16. *See* Opening Brief at 58-59. Granted. However, the rule certainly does not extend to requiring consideration of *inadmissible* evidence that violates multiple sections of the California Evidence Code. *See, e.g.*, Evid. Code, § 702.

As acknowledged in *Tuchscher Development Enterprises. v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219, this common sense limitation on the rule was confirmed recently by the California Supreme Court. *See Id.* at p. 1237 ("In *Wilson v. Parker, Covert &*

(continued...)

are...OVERRULED as to the argument that the plaintiff's declaration is unsigned and that it is untimely." (CT 355). Appellant's argument is a distraction, meant to cast attention away from the flawed Declaration testimony itself.

Chidester (2002) 28 Cal.4th 811, 821, our high court … reinforced the view that a plaintiff opposing a section 425.16 motion must support its claims with admissible evidence"). The court below was *required* to exclude the inadmissible evidence.

In light of the Supreme Court's decision in *Wilson*, the decision of the Superior Court to exclude the inadmissible, offending testimony was entirely proper and this Court should not disturb that decision.

IV. THE SUPERIOR COURT PROPERLY FOUND THAT RESPONDENTS MET THEIR BURDEN TO SHOW THE APPLICABILITY OF AFFIRMATIVE DEFENSES.

As demonstrated in section II.B.1. above, Governor Romer's statements were protected by California's statutory privilege conferred upon official statements made by public officers. Therefore, Respondents more than met their burden to show that the affirmative defense of official privilege applied in the instant case. Appellant challenges this conclusion in principle, but fails to provide a cogent argument supported by case law. Time and again, Appellant cites generally to case law but fails to explain how the cases are similar or why the rationale of the cited opinion should control in the instant case.

For example, Appellant casually cites to *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 in opposition to the application of the absolute privilege of Section 47(a), but provides no analysis or language from the case. *Mann* is completely distinguishable in that the defendant

there was a *private* party and not a *government* official (like Romer) reporting on a matter of grave community importance (race riots) to constituents who have a right to know what has happened and what the District intends to do about it (the Jefferson High community). By definition, the private party in *Mann* could never avail himself of the official privilege of Section 47(a).

Moreover, the case of *Royer v. Steinberg* (1979) Cal.App.3d 490, 501, as well as the California Education Code, establish irrefutably that Governor Romer is entitled to the immunity of Section 47(a) and no amount of conclusory attacks can obscure that fact.

The judgment of the Superior Court should be affirmed.

V. THE SUPERIOR COURT'S AWARD OF ATTORNEY'S FEES WAS REQUIRED GIVEN THE MANDATORY LANGUAGE OF SECTION 425.16(c).

The California anti-SLAPP statute *requires* an award of attorney's fees to the party that prosecutes a successful special motion to strike. *See* Section 425.16(c) ("a prevailing defendant on a special motion to strike *shall* be entitled to recover his or her attorney's fees and costs") (emphasis added). The language of the statute is mandatory, not discretionary. Accordingly, the Superior Court here properly awarded Respondents $6,325 in attorney's fees for their efforts in prosecuting the successful special motion to strike. (CT 355).

In opposition, Appellant cites generally to the case of *Endres v. Moran* (2006) 135 Cal.App.4th 952, but provides no pinpoint cite or actual language from the case to support his theory that the mandatory language of Section 425.16(c) mysteriously does not apply in the instant case. Leaving no doubt, the California Supreme Court has held that "any SLAPP defendant who brings a successful motion to strike is entitled to **mandatory** attorney fees." *See Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 (emphasis added). The Court should affirm the Superior Court's award of statutory fees and costs.

VI. THE COURT SHOULD AWARD RESPONDENTS THEIR ATTORNEY'S FEES AND COSTS INCURRED DEFENDING THIS APPEAL.

Section 425.16 provides for the recovery of fees and costs associated with defending the *appeal* of an order granting an anti-SLAPP motion. *See Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287 ("The appellate courts have construed section 425.16, subdivision (c), to include an attorney fees award on appeal."). The *Rosenaur* court, relying on the California rule that, "'[a] statute authorizing an attorney fee[s] award at the trial court level includes appellate attorneys fees unless the statute specifically provides otherwise,'" remanded the matter to the court below to determine the appropriate amount of attorneys' fees for the defendant who prevailed on appeal. *Id.* at p. 287 (citation omitted).

Respondents respectfully ask the Court to order Appellant to pay Respondents the reasonable amounts of attorney's fees incurred in connection with this appeal in an amount to be determined by the court below.

VII. CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed in all respects and the case should be remanded to the Superior Court to determine the appropriate amount of attorney's fees and costs incurred by Respondents in defending this appeal.

VIII. CERTIFICATE OF WORD COUNT

The text of Respondents' Brief consists of **11,737** words as calculated by the Microsoft Word system utilized to generate the Respondents' Brief and is therefore in compliance with California Rule of Court 8.20(c)(1).

January 17, 2007

Respectfully submitted,

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